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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 416.

THE UNITED STATES, PETITIONER,

vs.

WYMAN, PARTRIDGE & COMPANY, A CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

Brief for the Respondent in Opposition.

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OPINION BELOW.

The opinion of the Court of Claims (R. 9) has not been officially reported.

JURISDICTION.

The judgment sought to be reviewed was entered June 2, 1930. (R. 17.) The petition for writ of certiorari was filed September 2, 1930. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925.

QUESTION PRESENTED.

Whether Sections 607, 611 and 612 of the Revenue Act of 1928 prevent the respondent from recovering against the United States.

STATUTES INVOLVED.

Section 1106(a) of the revenue act of 1926 (c. 27, 44 Stat. 9, 113), provides:

> "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

Sections 607, 611 and 612 of the revenue act of 1928 (c. 852, 45 Stat. 791, 874, 875) provide:

> "SEC. 607. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.
>
> "SEC. 611. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this act) shall not be considered as an overpayment under the provisions of section 607, relating to pay-

ments made after the expiration of the period of limitation on assessment and collection.

"SEC. 612. Section 1106(a) of the revenue act of 1926 is repealed as of February 26, 1926."

STATEMENT.

The statement of the case set forth by the petitioner (R. 2) covers the pertinent facts involved in the case and no further statement is made by the respondent.

ARGUMENT.

The petitioner has advanced several reasons to show why its petition for certiorari should be granted. Reference is made by the petitioner to the cases of Graham *vs.* Goodcell, No. 36, October Term, 1930; Magee *vs.* United States, No. 65, October Term, 1930; Oak Worsted Mills *vs.* United States, No. 104, October Term, 1930, and Taft Woolen Company *vs.* United States, No. 105, October Term, 1930, all of which involve the construction and application of Section 611 of the Revenue Act of 1928. The statement is then made by the petitioner that these cases differ from the instant case only in the fact that in the cases cited the collection of the sum in controversy was made prior to the enactment of Section 1106(a) of the Revenue Act of 1926, whereas in the instant case collection was made after the enactment of this section of the law. The application for the writ would seem to indicate that this difference is of minor importance, whereas it is the one controlling fact which removes the case of this respondent from the principle announced in the cases cited by the petitioner. The most positive proof of this statement is the fact that of the four cases cited by the petitioner in Reason No. 1, three of them were decided by the Court of Claims, the very court that rendered judgment in favor of this respondent. Furthermore,

the judgment of the Court of Claims in the case of the respondent was rendered after that Court had reached its conclusion in the three cases referred to above which conclusively shows the lower court determined that the question involved in the instant case is materially different from the question involved in the cases cited by the petitioner. Consequently, the fact that Section 611 of the Revenue Act of 1928 is now before this Honorable Court on a question materially different from that found in the case of the respondent is not a reason under the rules and decisions of this court for the granting of a writ of certiorari in the instant case.

The second reason advanced by the petitioner for the granting of the writ is unsound. The statement is made that an application for a writ of certiorari will be filed in the case of Heiner *vs.* Erie Coal and Coke Company, decided against the Government July 9, 1930, by the Circuit Court of Appeals for the Third Circuit which involves the same point. The respondent admits that the principle in the Erie Coal & Coke Company case is similiar to the principle in its case, however, the Circuit Court of Appeals for the Third Circuit reached the same conclusion as did the Court of Claims in the case of the respondent and instead of being a reason for the allowance of the writ it is an argument for its disallowance. Furthermore, the cases referred to by the respondent that *may* come before this Honorable Court on points not involved in the case of this respondent should not be cited in support of a reason for the granting of a writ of certiorari in the instant case.

The third reason advanced by the petitioner for the granting of the writ is that "the court in substance neld unconstitutional Section 612 of the Revenue Act of 1928." It will be noted the petitioner stated that the Court "in substance" held Section 612 of the Revenue Act of 1928 unconstitutional. No reference was made to any portion of the decision of the Court of Claims to show wherein the Court decided the issue on a question of constitutional

law. A reference to the opinion of the Court of Claims (R. 12) will show that in speaking of Section 1106(a) of the Revenue Act of 1926, the Court said:

> "It had no application to what had been done prior to its enactment, but it warned the public officials that after it was enacted the exaction of a payment upon a tax as to which the statute of limitations had run was taking money from the taxpayer without any liability on its part existing, or, in short, a collection made where there was no debt. This construction appears to us to be a reasonable one from every point of view. There was no intention of making the statute retroactive and thus upsetting what had already been done, but it was intended that further collection of taxes after the period of limitations had run should stop. This would prevent further litigation and come nearer doing abstract justice than any other line of procedure that could have been provided.
>
> "Section 1106(a) of the 1926 act was repealed as of the date of its enactment by the 1928 revenue act, but the rights of the plaintiff having become vested they were not affected by this repeal."

It will be noted the Court said that the rights of the plaintiff were not "affected" by the repeal of Section 1106 of the Revenue Act of 1926. They did not say that the rights of the plaintiff were not "destroyed" by the repeal of Section 1106(a). This Honorable Court in a quite recent decision in the case of Russell et al. *vs.* United States, 278 U. S. 181, had occasion to construe the word "affect" as used in Section 278(e) of the Revenue Act of 1924 which provided that that section shall not "affect any assessment made, or distraint proceeding in Court begun before the enactment of this act." This Honorable Court construed the word "affect" in the above section to mean that it deprived Section 278 of any possible *application* to cases where assessment had been made prior to June 2, 1924. Under a similar construction of the decision of the Court of Claims it would seem that this Court concluded as a matter of

statutory construction that Section 612 of the Revenue Act of 1928 had no *application* to the case of the respondent.

Likewise, in speaking of the application of Section 611 of the Revenue Act of 1928 to the case of the respondent the Court of Claims said:

> "In a case like the one at bar, where the rights of the plaintiff had vested before the enactment of the 1928 act, the enactment of section 611 of that act had no more effect on plaintiff's rights than the repeal of Section 1106(a) of the 1926 act."

Again it would seem that the Court held that Section 611 of the Revenue Act of 1928 did not *apply* to the case of this respondent. And in a concurring opinion Judge Littleton said:

> "I do not deem it necessary to pass upon the constitutionality of the provisions of the 1928 act."

If there is any doubt about a question of this kind it should be presumed that the conclusion of the Court of Claims was reached through the application of principles of statutory construction rather than a declaration of unconstitutionality since it is a fundamental principle of law that where there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid the Courts will adopt the construction which will uphold it. Presser *vs.* State of Illinois, 116 U. S. 252; 6 S. Ct. 580.

The petitioner claims that the decision of the Court of Claims in the instant case is inconsistent with the decisions of this Honorable Court in the cases of Rafferty *vs.* Smith, Bell & Company, 257, U. S. 226; United States *vs.* Heinszen & Company, 206 U. S. 370; Campbell *vs.* Holt, 115 U. S. 620. This statement by the petitioner is an additional reason for the contention of the respondent that the decision of the Court of Claims was based upon principles of statutory construction as applied to Section

607, 611 and 612 of the Revenue Act of 1928, since the Court of Claims appears to be in full accord with the decisions cited by the petitioner. As already stated in the application filed by the petitioner there is now pending before this Honorable Court the cases of Magee *vs.* United States, Oak Worsted Mills *vs.* United States, and Taft Woolen Company *vs.* United States; all decided by the Court of Claims. The Court of Claims based its decision in the Magee and Taft Woolen Company cases on its opinion in the Oak Worsted Mills case. In the Oak Worsted Mills case the Court of Claims cited with approval the three Supreme Court cases referred to by the petitioner. The conclusion must, therefore, be reached that the Court of Claims in the case of this respondent did not feel that the principles in the cases cited had any application.

The petitioner contends that by the enactment of Sections 607, 611 and 612 of the Revenue Act of 1928, the United States withdrew its consent to be sued and prohibited the entry of judgment in the case of the respondent. The sections of the law referred to are set out in full at pages 2-3 of this brief. The petitioner failed to point out how the sections of the law referred to can be construed as a withdrawal by the United States of its consent to be sued. The word "Court" does not appear in Sections 607, 611 or 612 and there is no statement in any of these sections to the effect that the right of the petitioner to sue has been curtailed. The jurisdiction of the Court of Claims to entertain the suit of the respondent was established by the so-called Tucker Act, passed in 1883, which became Section 145 of the Judicial Code and which now appears as Section 250 of Title 28 of the Code of Laws of the United States of America. The question of the jurisdiction of the Court of Claims in cases of this type is no longer in controversy. Dooley *vs.* United States, 182 U. S. 222; United States *vs.* Emery, Bird, Thayer Realty Company, 237 U. S. 28. The respondent acquired its right to bring the suit under Section 3226 of the Revised Statutes as amended. Whenever

Congress intended to change or modify the provisions of Section 3226 of the revised statutes it specifically referred to that section and set forth the particulars in which it was amended. See Revenue Act of 1921, Chap. 136, Sec. 1318, 42 Stat. 315; Revenue Act of 1924, Chap. 234, Sec. 1014, 43 Stat. 343; Revenue Act of 1926, Chap. 27, Sec. 1113, 44 Stat. 9. Certainly if Congress by any provision of the Revenue Act of 1928 intended to amend Section 3226 specific reference would have been made to this section in the Revenue Act of 1928. Sections 3220, 3228, and 3176 of the revised statutes were amended by the Revenue Act of 1928. See Section 619 of the Revenue Act of 1928. It will be noted that specific reference is made to these sections of the revised statutes and amendments enacted in connection therewith. Certainly if Congress intended to amend Section 3226 it would have appeared as an amendment in Section 619 of the Revenue Act of 1928.

As far as the respondent can find no case in which the facts are similar to those in its case has been decided in favor of the Government. In fact, there does not appear to have been a dissenting opinion in any case.

Decisions have been rendered against the Government on facts similar to those in the case of this respondent in the following cases:

Pepsin Syrup Company *vs.* Schwaner, 35 Fed. (2d) 197, decided by the District Court for the Southern District of Illinois;

Clinton Iron & Steel Company *vs.* Heiner, 30 Fed. (2d) 542, decided by the District Court for the Western District of Pennsylvania;

Erie Coal & Coke Company *vs.* Heiner, 33 Fed. (2d) 135, decided by the District Court for the Western District of Pennsylvania;

Diamond Alkali Company *vs.* Collector, Par. 9150, C. C. H. Tax Service, 1930, decided by the District Court for the Western district of Pennsylvania, February 10, 1930;

Heiner *vs.* Erie Coal & Coke Company, decided by the Circuit Court of Appeals for the Third Circuit under date of July 9, 1930, affirming the District's Court's decision;

Wettengel *vs.* Robinson, decided by the Supreme Court of Pennsylvania, under date of May 14, 1930;

Southern Lumber Company *vs.* United States, decided by the District Court for the Western District of Arkansas, under date of May 6, 1930.

The case of Reeves *vs.* Anderson, decided July 21, 1930, by the Circuit Court of Appeals for the Second Circuit cited by the petitioner has no application to the case of the respondent for the reason that in that case collection was made prior to the passage of the Revenue Act of 1926, consequently, that case is similar to those now pending before this court.

It can be seen that there is no conflict in the authorities although the question has been presented to the Courts in various parts of the country. It would seem, therefore, that the law is well settled.

CONCLUSION.

It is submitted that the petitioner has advanced no sufficient reason under the rules and decisions of this Honorable Court for the issuance of a writ of certiorari and the respondent prays that the said writ be denied. Magnum Import Company *vs.* Coty, 262 U. S. 159; Hamilton Shoe Company *vs.* Wolf, 240 U. S. 251; Starney et al. *vs.* United States, 37 Fed. (2d) 188.

Respectfully submitted,

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